No. 56202-2-II

IN THE COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

DAVID BOGDANOV, Appellant

APPEAL FROM THE SUPERIOR COURT

OF CLARK COUNTY

THE HONORABLE JUDGE DAVID E. GREGERSON

BRIEF OF APPELLANT

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Legal Issue: A defendant has a compelling interest in having his guilt or innocence determined by a jury which is impartial and free from coercion by a trial court. Where the trial court is aware the jury is divided 11 to 1 and believes it is deadlocked, is it coercive for the court to call the jury in to instruct again on the duty to deliberate?

II. STATEMENT OF FACTS

On the evening of June 5, 2019, and into the morning of June 6th, David Bogdanov ("Bogdanov") and two of his brothers spent the evening drinking alcohol. Close to 3 a.m. they left to find a bar. Two of them went out to their van and waited for the third. As he sat in his brother's van Bogdanov noticed a young woman walking across the street by herself. RP 1486-87. He approached her to see if she needed help or a ride somewhere. She

declined his assistance, but after chatting, accepted his jacket, a bottle of vodka, and Bogdanov's Snapchat information. The two parted ways. RP 1488-89. Unbeknownst to Bogdanov, N.K., was a 17-year-old transgender transient. RP 670, 673.

N.K. returned to her friend's apartment and smoked or injected herself with methamphetamines. RP 972, 976, 986-988. She told her roommates she met a man who had agreed to help her retrieve her phone. RP 967,984. A few hours later, using the Snapchat information, N.K. used her friend's phone to arrange to meet Bogdanov. RP 1490-1491. N.K. was under the influence of methamphetamines when she left the apartment. RP 972,985.

Bogdanov picked her up in his brother's van and they returned to his apartment. They drank beer and talked for about 20 minutes. RP 1491-92. Bogdanov's brother drove them to another family member's home,

where Bogdanov had parked his own car, an Audi. RP 1494-95.

Bogdanov went into the house so he could use the bathroom. RP 1496. When he returned to the Audi, he found N.K. in the backseat smoking meth. RP 1496. He did not complain about the drugs because he hoped they might have a sexual encounter. RP 1498.

Bogdanov regularly carried a permitted concealed gun. RP 1012; 1500. He told her he had a carry permit "so that she doesn't freak out or anything." RP 1500. He removed his gun, wedging it between the center console and the driver's seat. At N.K.'s invitation, he climbed into the backseat with her. RP 1498-1500.

They kissed and N.K. engaged in oral sex with Bogdanov. During the encounter Bogdanov became aware N.K. was anatomically male. RP 1508-09. Stunned, Bogdanov pushed her from him. He yelled for

her to get out of his car and called her disgusting. RP 1510.

N.K. lunged toward Bogdanov and slapped him in the face. RP 1510. He shoved her telling her to get out of his car. She kicked at him and he pushed her feet down. RP 1510-11. At that moment, she jumped toward the center console, reaching for his loaded gun. RP 1511. She got it onto the passenger seat. RP 1521.

Bogdanov thought, "I just was deceived by this person into - - into oral sex and this person is high on meth. She's jumping for my gun…And all I can think is 'oh my God, I'm going to get shot right now. This person is crazy.'" RP 1511.

Afraid he would be shot, he tried to restrain her. She elbowed him in the face and scratched at his eyes. RP 1512,1514. N.K. hit, kicked and scratched him as Bogdanov yelled for her to stop. He intended to keep the gun away from her and to open the car door wide enough

to push her out to the road. RP 1515. He grabbed her by the collar with one hand and yanked her back, while using his other hand to keep her hands away from the gun. RP 1512.

As they struggled, his grip slipped from her windbreaker.

> I couldn't get a hold of her – couldn't stop her. And then in the passenger seat – the front passenger seat, in the rear pocket was hanging out my phone cord – my charging cable. And in that struggle, I – I grabbed that cable and put it around her and so I could hold onto it and pulled her back like that and hold her – hold her from going – keep going forward for the gun.

RP 1512-13
.

He kept the phone cord around her neck for 30 to 45 seconds. RP 1514. She stopped fighting and he thought she passed out, "Like I've seen on TV in fighting sports—people get choked out and they just go to sleep for a little bit." RP 1515. He secured the gun in the car

trunk and when he returned, he saw she had not awakened. RP 1515,1517.

He panicked because she had stopped breathing. RP 1517-18. He drove to Larch Mountain, removed her body from the car, and pushed her down a hill. RP 1519. Four days later N.K.'s mother reported her transient daughter as missing. RP 676; 678. Six months later, December 7, 2019, N.K.'s body was discovered. RP 1071.

Bogdanov flew to Ukraine on the night of June 6, 2019 and returned to the United States on July 15, 2019. RP 1439;1519-20,1551.

On December 17, 2019, police arrested Bogdanov. CP 1. Clark County prosecutors charged him by second amended information with murder in the second degree, and malicious harassment. CP 183. The court set bail at 750 thousand dollars and later raised it to two million dollars. RP 25. He remained in jail for the duration.

Phone Calls From Jail

On December 26, 2019, and January 1, 2020, Bogdanov used the jail telephone system to talk with his family. (Exh. 137). Defense counsel objected to admission of the calls to be used as evidence against Bogdanov. RP 230-239. Counsel specifically argued it violated equal protection to admit the calls: had Bogdanov been financially able to post bail, none of his calls would have been recorded. Additionally, the calls were purportedly listened to for jail safety but were actually used as evidence against a defendant. The court denied the motion to suppress. CP 62-74; RP 240.

A Russian speaking police offer who listened to the calls testified Bogdanov used the word translated as "faggot" when describing what other people said about N.K. RP 1092. Bogdanov did not himself use the word to describe N.K. RP 1099.

A court-certified interpreter and Russian language instructor translated both phone calls. She reported she heard the word “pedik” once in each call. RP 1123-1126. She translated the word to mean pedophile, often used to name people of untraditional sexual orientation. She also reported that Bogdanov used the word quoting what someone else has said, not his own opinion of N.K. RP 1129, 1136-37.

Bogdanov later testified he had been taught that homosexuality was a sin, but that he did not hate members of the LGBTQ community and had never fought with someone because they were a member of the community. RP 1475,1477.

Jury Instructions

Over defense objection, the trial court refused to give the full the Washington Pattern Jury Instruction 16.02 for justifiable homicide, or the WPIC 16.03 Justifiable

homicide- resistance to a felony. The court instructed the jury:

> It is a defense to the charge of murder that the homicide was justifiable as defined in this instruction.
>
> Homicide is justifiable when
>
> (1) The slayer reasonably believed that the person slain *intended to inflict death or great personal injury;*
>
> (2) The slayer reasonably believed that there was *imminent danger of such harm being accomplished*; and
>
> (3) The slayer employed such force and means as a reasonable prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 297. (Italics added). The court provided a jury instruction on the meaning of great personal injury. CP 298.

The court provided a to-convict jury instruction for the charge of murder in the second degree:

> To convict the defendant of the crime of murder in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about June 6, 2019, the defendant acted with intent to cause the death of N.G.K.;
> (2) That N.G.K. died as a result of the defendant's acts; and
> (3) That any of these acts occurred in the State of Washington.
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 294.

Over defense objection, the trial court provided a standard first-aggressor jury instruction. CP 299; RP 1612,1618.

Jury Deliberations

On August 25, 2020, the jury retired to deliberate at 2:39 pm. (Supp. CP_____). At 4:13 pm, the court informed counsel they had to replace Juror #2, who had become ill and could not continue. (Supp. CP ____). RP

1801. RP The jury retired to deliberate six minutes later. (Supp. CP___).

The following morning, at 8:15 a.m. the clerk delivered exhibits to the jury. (Supp. CP ___). Between 8:15 a.m. and 9:54 a.m., the clerk's notes appear to indicate the jury presented a question to the court about premeditation. RP 1816-1817. (Supp. CP _____ August 26, 2021, 9:54 a.m.). The jury question was not filed in the court file and there is no transcript of the court reading the question aloud to the attorneys or the court's written response.

The content of the note developed in context with other jury questions appears to have been a question about the difference between premeditation and intent. The court appears to have referred the jury back to their instructions. RP 1820; (Supp. CP ____).

There appears to have been a second note, which also was not filed with the court. RP 1815. The court said,

"We received a message from the presiding juror that they were concerned about the ability to reach a verdict." RP 1815.

The State advocated sending the jury back for further deliberations. RP 1816. The prosecutor further encouraged the court to provide a non-WPIC jury instruction that "premeditation" was not an element of second-degree murder. RP 1816. The prosecutor speculated the jury was stuck on premeditation. RP 1817.

Defense counsel objected, noting the court had already instructed the jury they should refer to their instructions, and should not allow themselves to be bullied. Counsel argued that a non-WPIC instruction regarding premeditation along with an admonition to continue amounted to undue persuasion. RP 1822.

At 10:22 am the jury sent a note to the court: "We have a juror that would like to a (sic) break from the room." CP 279.

Over defense objection, the court provided jury instruction 24:

> "Without premeditation" is not an essential element of the crime of Murder in the Second Degree that the State must prove beyond a reasonable doubt. The elements of the crime of Murder in the Second Degree are listed in Instruction No. 10. You are not to give this instruction special importance just because it was read separately. Consider along with all of the instructions you have received.

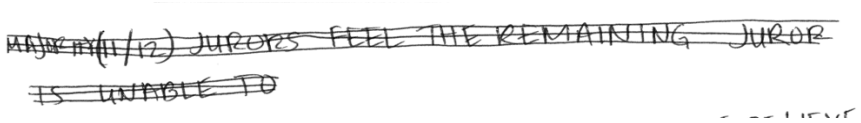
CP 309; RP 1823-24;1829.

Defense counsel moved for a mistrial, arguing the court was not just answering a juror's question, it was providing additional instruction which could not be addressed by defense counsel with the jury. The court denied the motion for a mistrial. RP 1828.

Shortly before 1:47 p.m. the jury indicated they had reached a verdict. However, the jury actually provided another note to the court:

> We have a concern with a juror; we believe she is unable to make a decision based on the facts. While deliberating she is unable to express the reasoning for her position and refuses to.

On the upper left-hand side of the note was the following:



CP 280; RP 1838.

The court seemed to think the juror said they had reached a verdict on one count, but not the other. The juror did not indicate which charge had been decided. RP 1830, 1832. The parties and court agreed to question the presiding juror on the possibility of reaching a verdict. RP 1832.

The presiding juror told the court the jury did *not* believe they could reach a verdict on the other count, "with the current jury we have." RP 1832. The court returned the presiding juror to the jury room to fill out the form for the one verdict upon which they had agreed. RP 1833;1838.

About 12 minutes later, the presiding juror submitted another note:

> Can we replace a juror (1) and call in an alternate, if the current juror is unable to make decisions on factual evidence and is unwilling to deliberate further? We feel it is a personal bias, with this (1) current juror. She is refusing to continue to discuss her views.

CP 281; RP 1838.

The State advocated for the court to reinstruct the jury on their obligation to deliberate. RP 1839-1840. Defense counsel objected, stating it was not juror misconduct simply because the juror had already made up his/her mind. RP 1840.

> At this juncture, there was a question -- they were given -- they were told to go back to the Instructions; they had -- then they came back about we can't -- we have a hung jury. I opposed this new instruction that they were given. And this is also my concern.
>
> There was a discussion about voting and persuasion and undue influence. And while they went back and we -- and the Court addressed the premeditation issue, there was no additional information given to them or another instruction on

> the deliberating and a hung jury -- because that was their question. I think their initial question is -- we're hung, we're deadlocked. Oh, okay, but let's readdress the premeditation issue because maybe that's why they're hung. And maybe that's not the case and we didn't know at the time -- it was speculative. The timing of it suggested it, but it's pure speculation. Now this sounds like maybe that wasn't what they were deadlocked on; maybe they were deadlocked on a potential misconduct issue.
>
> This is a minefield right now. I think the only thing that we can do at this juncture is move for a mistrial.

RP 1842-43.

Over defense objection, the court recalled the jury and re-read jury instruction number 2 about the duty to discuss and deliberate. RP 1847-48.

The following morning, the jury reached a verdict within the first hour of deliberations. RP 1855. The jury found Bogdanov guilty on both counts. CP 310-311. The court imposed the top of the standard range sentence of 234 months. CP 325.

The court found Bogdanov indigent. CP 324-325. The court imposed the mandatory fees; it included the

boilerplate obligation to pay supervision fees as determined by the DOC while on community custody. CP 326.

Bogdanov makes this timely appeal. CP 336.

III. ARGUMENT

A. The Trial Court's Instruction Deprived Mr. Bogdanov Of A Fair Trial.

This Court reviews de novo a claim of instructional error. *State v. Sublett,* 176 Wn.2d 58,78, 292 P.3d 715 (2015). "Jury instructions must more than adequately convey the law of self-defense", they must also "make the relevant legal standard manifestly apparent to the average juror." *State v. Corn,* 95 Wn. App. 41, 52, 975 P.2d 520 (1999); *State v. Kyllo,* 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

> By statute, a homicide is *justifiable* (1) In the lawful defense of the slayer, … when there is reasonable ground to apprehend a design on the part of the

person slain *to commit a felony* or to do some great personal injury to the slayer or to any such person, and there is *imminent danger of such* design being accomplished; or

(2) In the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, or upon or in a dwelling, or other place of abode, in which he or she is. RCW 9A.16.050(1), (2).

The disjunctive subsections have different elements. Subsection (1) allows an individual to act when there is reasonable apprehension that he is in imminent danger that someone *will* commit a felony against him that may result death or in great personal injury. Subsection (2) addresses the circumstance in which the felony has occurred or is actually occurring. Because of the disjunctive structure, the requirements of great personal injury and imminent danger do not relate to

subsection (2). *State v. Ackerman,* 11 Wn.App.2d 304, 314, 453 P.3d 749 (2019).

The Washington Pattern Jury Instruction Criminal (WPIC) provide two separate instructions addressing the defense found in RCW 9A.16.050.

WPIC 16.02 provides homicide is justifiable when committed in lawful defense of the slayer, when he reasonably believed the person slain intended [to commit a felony][to inflict death or great personal injury]; and reasonably believed there was imminent danger of such harm being accomplished; and used force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time of the incident.

WPIC 16.03 similarly follows the statutory elements of RCW 9A.16.050(2) providing in pertinent part:

> Homicide is justifiable when committed in the actual *resistance of* an *attempt to commit a felony* upon the slayer…

WPIC 16.03 addresses the situation found in RCW 9A.16.050(2), the right to defend oneself from a felony as it occurs. This right exists independently from the right to defend oneself from the use of deadly force or the anticipation of being the victim of a felony. Under the law, the felony that is occurring need not be one that may end in death or great personal injury.

Here, the State urged the court to provide only one portion of WPIC 16.02 (intention to inflict death or great personal injury), and none of WPIC 16.03. RP 1600. The State argued to the court "it seems duplicative to say both [WPIC 16.02 and WPIC 16.03] of those things when it really comes down to the same standard. That the feared death or personal injury. RP 1603. And again, "So it's the State's position that if 16.02 is going to be given - - -….it only really needs to say…the slayer reasonably believed

that the person slain intended to inflict death or great personal injury. That does subsume this felony that would also have to be threatening the same thing." RP 1605. The court agreed and provided a jury instruction which omitted any mention of resisting a felony. The court refused to give WPIC 16.03.

The court's reasoning overlooked *State v. Ackerman.* Further if every case of self-defense in response to an anticipated felony or an actual felony were subsumed under the standard of "inflict death or great personal injury" RCW 9A.16.050(2) is meaningless.

"The class of crimes in prevention of which a man may, if necessary, exercise his natural right to repel force by force to the taking of the life of the aggressor, are felonies which are committed by violence and surprise; such as murder, robbery, burglary, arson, …sodomy, and rape." *State v. Brightman,* 155 Wn.2d 506, 522, 122 P.3d 150 (2005). Inclusion of robbery, burglary, and arson

underscore that justifiable homicide under section (2) does not require a belief that the slain person intended to inflict death or great personal injury. *State v. Ackerman,* 11 Wn.App. at 314.

In *Ackerman,* the defendant shot a man while resisting an armed robbery. The Court reversed the conviction, holding that the use of deadly force to resist a robbery may be reasonable *even if* there is no reasonable belief of imminent danger of death or great personal injury. *Id.* at 314-315. *Ackerman* demonstrates that the felony itself justifies the use of reasonable force. *Brightman,* 105 Wn.2d at 522. Indeed,

> "[T]he very basis of the law of self-defense rests on the concept that "*in resisting an attempt to commit a felony* the person so resisting is not required to determine with absolute certainty what force is necessary for that purpose, but it does exact of him that he shall not use any more force than shall seem to him to be reasonably necessary for that purpose."

Id. at 523. (Italics added)

Mr. Bogdanov was entitled to an instruction telling the jury that under the law, he was justified in using deadly force to resist the attempted first-degree assault. The court must view the evidence in the light most favorable to the party requesting a jury instruction. *State v. Fernandez-Medina,* 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). The court does not weigh whether the evidence is sufficient for a jury to conclude he was resisting a felony, but he is entitled to the instruction if there is some evidence to support it. *Mathews v. United States,* 485 U.S. 58, 62-63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988); *State v. Arbogast,* 199 Wn.2d 356, 371, 506 P.3d 1238 (2022).

Bogdanov's defense was that he pushed N.K. away from him to end a nonconsensual sexual encounter. N.K., under the influence of methamphetamines, slapped, kicked, scratched, and continually reached for his gun. Bogdanov, who wanted N.K. out of his car, defended

himself from an ongoing felony of assault second degree and an attempted felony of first-degree assault.

The instructions must make the law manifestly apparent to the average juror. Where an instruction does not accurately state the law of self-defense it misleads the jury. *State v. Irons,* 101 Wn.App. 544, 559, 4 P.3d 174 (2000). Where the court refuses to instruct the jury that deadly force is lawful when resisting a felony, it failed to make the law manifestly apparent.

Here, the trial court's alteration of the instruction on justifiable self-defense misstated the legal standard for self-defense. An error affecting a defendant's self-defense claim is constitutional and requires reversal unless it is harmless beyond a reasonable doubt. *State v. Arth,* 121 Wn.App. 205, 213, 87 P.3d 1206 (2004).

The instruction on justifiable homicide lessened the State's burden to disprove self-defense. It deprived Bogdanov of his constitutional statutory right to resist an

attempted felony against his person. WA Const. Art. I §24; RCW 9A.16.050. This matter must be reversed.

B. Mr. Bogdanov Received Ineffective Assistance of Counsel.

A criminal defendant has an unqualified right to have a jury instructed on an applicable lesser-included offense. *State v. Parker,* 102 Wn.2d 161,164, 683 P.2d 189 (1984); RCW 10.61.006. "The reason lesser included instructions are given is to assist the jury in weighing the evidence, determining witness credibility, and deciding disputed questions of fact." *State v. Coryell,* 197 Wn.2d 397, 414, 483 P.3d 98 (2021).

In *Coryell,* the Court reasoned that where there is affirmative evidence from which a jury could conclude that "only" the lesser included offense occurred, a lesser included instruction ought to be given. The Court emphasized that the word "only" was meant to suggest that a *jury* might have a reasonable doubt about whether

the charged crime was committed but may find the lesser crime was committed. *Coryell,* 197 Wn.2d at 414.

> The test was never intended to require evidence that the greater, charged crime was not committed—only that a jury, faced with conflicting evidence, could conclude the prosecution had proved only the lesser or inferior crime.

Id. at 414-415.

An accidental death, which occurs because of criminal recklessness or negligence is classified as manslaughter. RCW 9A.32.060; RCW 9A.32.070. Manslaughter is a lesser included offense of intentional murder in the second degree. *State v. Warden,* 133 Wn.2d 559, 563, 947 P.2d 708 (1997).

Bogdanov was charged with murder in the second degree. He presented two defenses: first, that he reasonably defended himself from an assault which resulted in N.K.'s death. Second, he testified he did not

mean to kill N.K. Bogdanov expected that she had passed out and would wake up.

In closing argument, the prosecutor vigorously argued that “none of these defenses to homicide actually apply in this case.” RP 1783-84. However, this does not foreclose the real possibility that a reasonable jury could have found that Bogdanov committed the homicide, but his actions were negligent or reckless rather than excusable or justifiable. There was no tactical reason for defense counsel not to request a jury instruction on the lesser included offense of manslaughter.

The right to counsel guaranteed by the Sixth Amendment is satisfied only where counsel provides effective assistance. *Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The purpose is to ensure the defendant obtains a fair trial. *Id.* at 684-85. This Court reviews claims for ineffective

assistance of counsel de novo. *State v. Sutherby,*165 Wn.2d 870, 883, 204 P.3d 916 (2009).

"To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) defense counsel's representation was deficient in that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant." *State v. Grott*, 195 Wn.2d 256, 274, 458 P.3d 750, 759 (2020).

"Representation is deficient if, after considering all the circumstances, the performance falls below an objective standard of reasonableness…Prejudice exists if there is a reasonable probability that, except for counsel's errors, the result of the proceeding would have differed." *State v. Estes*, 193 Wn. App. 479, 488, 193 Wn.App. 479 (2016).

Generally, where counsel's conduct can be characterized as a legitimate trial strategy or tactics, performance will not be considered deficient. *State v.*

Kyllo, 166 Wn.2d at 863. The question is not whether trial counsel's choices were strategic, but whether they were reasonable. *State v. Grier,* 171 Wn.2d 17, 246 P.3d 1260 (2011).

Here, the jury was tasked with weighing the evidence and determining whether Bogdanov intentionally acted, recklessly acted, negligently acted, or acted justifiably or excusably. Failing to request a jury instruction on manslaughter was not reasonable. It resulted in ineffective assistance of counsel. This matter must be reversed.

C. The Trial Court Erred When It Provided Additional Jury Instruction After The Jury Had Begun To Deliberate.

A court may exercise its discretion and give additional instructions to a jury during deliberations. *State v. Sublett,* 176 Wn.2d at 82. However, "[s]upplemental instructions should not go beyond matters that either had

been or could have been argued to the jury." *State v. Ransom,* 56 Wn.App. 712, 714, 785 P.2d 469 (1990).

This Court reviews jury instructions de novo, within the context of the jury instructions as a whole. *State v. Pirtle,* 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Additional instructions may not add a legal theory of criminal culpability or a new theory. *State v. Becklin,* 163 Wn.2d 519, 529-30, 182 P.3d 944 (2008); *Ransom,* 56 Wn.App. 713.

Here, in violation of CrR 6.15(f), a question posed by the jury regarding premeditation and intent was not made a part of the written or verbatim record. This makes it difficult for the appellant and reviewing court to determine whether prejudice occurred. CrR 6.15 provides: "Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a

deliberating jury in open court or in writing." This oversight should not be counted against the defendant.

Apparently, the jury was directed to refer to their instructions. Premeditation had not been defined. It had not been part of a to-convict instruction. No one had discussed premeditation with the jury.

An hour later, the jury indicated they were having difficulty coming to a unanimous decision. The court speculated, along with the prosecutor that maybe the jury needed instruction that premeditation was not an element of second-degree murder.

Over defense objection, the court gave jury instruction number 24: informing the jury "'Without premeditation" is not an essential element of the crime of murder in the second degree that the State must prove beyond a reasonable doubt. The elements of the crime of murder in the second degree are listed in instruction No. 10. You are not to give this instruction special importance

just because it was read separately. Consider it along with all of the instructions you have received." CP 309.

Supplemental instructions may be appropriate in certain circumstances. *State v. Watkins,* 99 Wn.2d 166, 179, 669 P.2d 1117 (1983). However, this is not one of those circumstances and the instruction was impermissibly prejudicial.

First, the court admittedly had no idea why the jury was unable to come to a decision. Offering the non-WPIC instruction sua sponte on a hunch was objectively unreasonable. A judge is prohibited by article IV, §16 from "conveying to the jury his personal attitudes" toward the merits of the case or instructing a jury that matters of fact have been established as a matter of law. *State v. Levy,* 156 Wn.2d 709, 720, 132 P.3d 1076 (2006).

In *Levy,* the Court held that "to-wit" references in jury instructions to an apartment as a 'building' and a crowbar as a 'deadly weapon' constituted constitutionally

prohibited judicial comments on the evidence as the comments improperly suggested these facts had been established as a matter of law. The Court held that a judicial comment in a jury instruction is presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. *State v. Levy,* 156 Wn.2d at 725.

Here, the response could easily have been perceived by the jury as a comment on the evidence by the court. The court did not answer the jurors' question about the difference between premeditation and intent: it actually provided them with a different instruction which defense counsel was not able to address in front of the jury. The written comment that the State was not required to prove "without premeditation" beyond a reasonable doubt was inartfully worded because it altered the perception of the burden of the State.

While the State had no burden to prove without premeditation to convict of murder in the second degree, the jury had already been concerned about intent and premeditation. It could have continued to conflate the two terms and reasoned that as a matter of law, the State did not have to prove intent/premeditation beyond a reasonable doubt. This is highly prejudicial. Unless the State can show there was no prejudice, as it cannot, this matter should be reversed.

D. The Trial Court Violated Mr. Bogdanov's Right To A Fair Trial When It Instructed The Jurors To Continue Deliberating After They Reported Being Deadlocked.

"The right of a jury to hang is an extremely important and useful one. '[A]s history reminds us, a succession of juries may legitimately fail to agree until, at long last, the prosecution gives up. But such juries, perhaps more courageous than any other, have

performed their useful, vital functions in our system. This is the kind of independence which should be encouraged. It is in this independence that liberty is secured." *On Instructing Deadlocked Juries,*78 Yale L.J. 100, 142 (1968)citing to *Huffman v. United States,* 297 F.2d 754, 759 (5th Cir. 1962) (dissent).

Criminal defendants are guaranteed the right to a unanimous verdict. Art. 1, §§21,22. Each juror must participate. However, "there are no requirements as to how much or how long a juror must speak, listen, or deliberate before forming an opinion." *State v. Morfin,* 171 Wn.App. 1, 10, 287 P.3d 600 (2012); CrR 6.15(f)(2).

Where a jury has difficulty reaching a verdict because of a lone dissenter, it may be more indicative that the case was not "open and shut" than that the dissenter is not inclined to deliberate. *See State v. Depaz,* 165 Wn.2d 842, 204 P.3d 217 (2009). Jurors who are accused of nullification or refusal to follow the law may

simply disagree with the assessment of the evidence. *Id.* at 222.

Here, before the jury was sent for deliberations, they were instructed they had a duty to deliberate, re-examine their own views of the evidence, not to surrender their honest beliefs about the evidence solely because of the opinions of fellow jurors. They were cautioned they should not change their minds for the purpose of reaching a verdict. CP 286.

Elmore provides the framework for dealing with serial notes from the jury that a particular juror is "refusing to deliberate". *State v. Elmore,* 155 Wn.2d 758, 768-69, 123 P.3d 72 (2005). In *Elmore,* the Court determined the first step was to reinstruct the jury. Where reinstruction is ineffective, a further inquiry by the court should focus on the process of deliberations and the conduct of jurors. Failure to resolve the issue may necessitate the court engaging in further inquiry, questioning the complaining

juror(s), the accused, and all or some other jury members. *Elmore,* 155 Wn.2d at 774.

The issue in this case was the jury sent out three notes regarding the dissenting juror. Under inquiry, the court specifically learned the jury did not believe it could come to a decision. The court gave the "without premeditation instruction." The court re-read the instruction to deliberate. The court sent the jury back to deliberate even after being told they were 11 votes to 1 and it likely would not change. And finally, a note that the jury could not come to a unanimous decision with its current make-up.

In *Morfin,* the juror's alleged refusal to continue to deliberate was found to be evidence that he had made up his mind, rather than he refused to listen to other's viewpoints. Further, the juror was unwilling to continue discussions, but he was willing to vote. *Morfin,* 171

Wn.App. at 5-7. There was no evidence the juror was a dissenting vote.

Here, the juror also had finished deliberating and did not wish to discuss the issues any further. However, the juror in this case voted contrary to the other venire members. It was not until the third day of deliberations that the lone juror changed her mind.

"Participants in a discussion are often influenced to change their opinion simply by the knowledge that an overwhelming majority disagrees with them. Consistent disapproval by a majority can shake a small minority's faith even in judgments it believes to be right." On Instructing Deadlocked Juries, at 110. "Such pressures are *most effective against a single dissenter and* fall off rapidly in efficacy as the size of the dissenting coalition increases." *Id.*

Trial counsel made a motion for a mistrial twice based on a concern the lone juror was subject to undue coercion and it resulted in an unfair trial for Bogdanov.

When a jury acknowledges through its presiding juror that it is hopelessly deadlocked "there is a factual basis sufficient to constitute the 'extraordinary and striking' circumstance necessary to justify the discharge." *State v. Fish,* 99 Wn.App. 86, 90, 992 P.2d 505 (1999).

In *Fish,* the jury notified the court three times on its own accord that it was unable to reach a verdict. The court was justified in declaring a mistrial. *Id.* at 91-92.

In *Dykstra*, there was a breakdown in deliberations, the presiding juror stated the jury could not reach a conclusion within a reasonable period of time and dismissed the jury after a total of 13 hours of deliberation. *State v. Dykstra,* 33 Wn.App. 648, 656 P.2d 1137 (1983). The reviewing Court held the trial judge did not abuse its discretion.

CrR 6.15(f) was adopted to curtail judicial coercion of a deadlocked jury. The rule prevents the trial court from instructing the jury it needs to agree, consequences of no agreement, or the length of time a jury should deliberate.

Here, the jury had deliberated for about ten hours. (Supp. CP ____ Clerk's Notes). They had three times indicated there was a problem. The court offered two instructions. The court conducted the proper inquiry under *Elmore*.

The problem here, was the undue pressure on the lone juror to change her mind. Even if the court's direction to continue deliberating was never intended to be coercive, withstanding the pressure of 11 other jurors and being "reminded" that everyone had to "deliberate" could only be perceived as a message to the dissenting juror to reconsider. The juror had made up her mind.

A trial court should grant a mistrial when the defendant has been so prejudiced that nothing short of a

new trial can insure he will be treated fairly. *State v. Wade,* 186 Wn.App. 749, 346 P.3d 838 (2015). The distinct possibility that a juror was left with the impression that she should follow the majority rendered the trial unfair. This matter must be reversed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Bogdanov respectfully asks this Court to reverse his convictions.

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Submitted this 27th day of June 2022.

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that June 27, 2022, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Clark County Prosecuting Attorney at cntypa.generaldelivery@clark.wa.gov and to David Bogdanov/DOC#429555 Washington State Penitentiary, 1313 N. 13th, Walla Walla, WA 99362.

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